



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 43 OF 2019

DANSON NYAGA NJERU.....PLAINTIFF

VERSUS

JEREMIAH NJUE NAMU (*Being sued on behalf of the Estate of*

NAMU NJANGURU *Deceased*).....DEFENDANT

RULING

A. INTRODUCTION

1. By a notice of motion dated 5th June 2020 expressed to be brought under **Order 42 Rule 6** of the **Civil Procedure Rules** (the *Rules*) and **Article 50** of the **Constitution of Kenya 2020**, the Defendant sought a stay of execution of the judgement and decree of the court dated 12th March 2020 pending the hearing and determination of an intended appeal against it to the Court of Appeal.

B. THE DEFENDANT'S CASE

2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Defendant on 5th June 2020. The Defendant contended that he was dissatisfied with the said judgement and decree hence he intended to challenge to it before the Court of Appeal. It was contended that the intended appeal might be rendered nugatory unless the stay was granted. It was further contended that the Plaintiff shall not suffer any prejudice should the order of stay be granted and that the Defendant was willing to furnish security for due performance of the decree.

C. THE PLAINTIFF'S RESPONSE

3. The Plaintiff filed a replying affidavit sworn on 10th June 2020 in opposition to the said application on several grounds. First, it was contended that the Defendant had filed a notice of appeal on 5th June 2020 out of time and without leave of the Court of Appeal. Second, it was contended that there was undue delay in filing the instant application as it was filed 3 months after delivery of judgement. Third, it was contended that the Plaintiff had resumed occupation of the suit property after judgement hence the application was aimed at frustrating him in the enjoyment of the fruits of his judgment. Fourth, the Plaintiff contended that the suit property was his main source of livelihood hence he would suffer immensely if a stay was granted.

D. DIRECTIONS ON SUBMISSIONS

4. When the said application was listed for *inter partes* hearing on 11th June 2020 it was directed that the same shall be canvassed through written submissions. The Defendant was granted 14 days to file a further affidavit and written submissions whereas the Plaintiff was granted 14 days to file his submissions upon the lapse of the Defendant's period. The record shows that whereas the Plaintiff filed his submissions on 9th July 2020 the Defendant's submissions were not on record by the time of preparation of the ruling.

E. THE QUESTION FOR DETERMINATION

5. The court has perused the Defendant's notice of motion dated 5th June 2020 together with the supporting affidavit and annexures thereto, the Plaintiff's replying affidavit in opposition thereto and the submissions on record. The court is of the opinion that the main question for determination is whether the Defendant has made out a case for the grant of stay of execution pending appeal.

F. ANALYSIS AND DETERMINATION

6. The factors to be considered in an application for stay of execution pending appeal are set out in **Order 42 Rule 6** of the **Rules**. The

relevant parts of **Order 42 Rule 6** stipulate as follows:

“2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.” (emphasis added)

7. So, has the Defendant demonstrated what substantial loss, if any, he might suffer unless the stay is granted? The court has carefully perused the Defendant’s affidavit in support of the application. He has not demonstrated what substantial loss he might suffer save the contention that his intended appeal might otherwise be rendered nugatory if the decree is executed before his intended appeal is heard. It was not contended that the Plaintiff intended to dispose of or deal with the suit property in such manner that it would not be available for restitution upon conclusion of the intended appeal.

8. Whereas the court would be inclined to accept that alienation of the suit property during the pendency of an appeal may render the outcome of the appeal, if successful, nugatory there is no material on record to demonstrate such risk. The Defendant himself did not allege that the Plaintiff was intending to alienate the suit property or that it may not be available for any other reason upon conclusion of the intended appeal. Accordingly, the court finds and holds that the Defendant has not demonstrated the risk of substantial loss within the meaning of **Order 42 Rule 6(2)** of the **Civil Procedure Rules**.

9. The court has also considered whether the instant application was filed without unreasonable delay. It is common ground that the judgement sought to be stayed was delivered on 12th March 2020. It is evident from the record that the application for stay was filed on 5th June 2020 under certificate of urgency. Although the judiciary scaled down operations with effect from 16th March 2020 due to the Covid-19 pandemic, the operations of the Judiciary were not halted. The Judiciary still allowed parties and litigants to file urgent applications through electronic means. It is also in the public domain that the Judiciary upscaled its operations with effect from 21st April 2020. So, assuming that the Defendant was waiting for upscaling of operations then the delay between 21st April 2020 and 5th June 2020 has not been explained in any satisfactory manner. Accordingly, the court finds and holds that the instant application was not filed without unreasonable delay within the meaning of **Order 42 Rule 6 (2)** of the **Rules**.

G. CONCLUSION AND DISPOSAL ORDER

10. The upshot of the foregoing is that the court finds no merit in the Defendant’s notice of motion dated 5th June 2020. Accordingly, the same is hereby dismissed with costs to the Plaintiff. It is so ordered.

RULING DATED and **SIGNED** in Chambers at **EMBU** this **16TH DAY** of **JULY, 2020** and delivered via Microsoft Teams platform in the presence of Ms. Kiai holding brief for Mr. Kathungu for the Plaintiff and in the absence of the Defendant.

Y.M. ANGIMA

JUDGE

16.07.2020